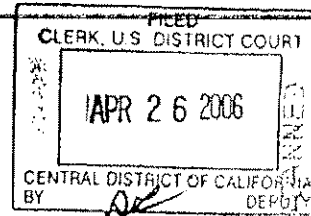
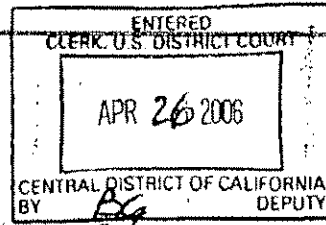


Exhibit A



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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GERGORY V. GILLES,) CV 05-7537 SVW (FMOx)
)
Plaintiff,) ORDER GRANTING DEFENDANT'S
) MOTION FOR PARTIAL DISMISSAL
v.) AND MOTION TO STRIKE [29, 30]
)
MICRO ELECTRONICS, INC.,)
)
Defendant.)

I. INTRODUCTION

Plaintiff Gregory C. Gilles ("Gilles" or "Plaintiff") brought this purported class action against Defendant Micro Electronics, Inc. ("Micro Electronics" or "Defendant") and ten Does for alleged violations of overtime and minimum wage statutes. On February 17, 2006, the Court granted in part and denied in part Defendant's motion to dismiss the initial complaint. In particular, the Court dismissed the fraud and negligent misrepresentation claims for failure to plead

48

1 with particularity under Federal Rule of Civil Procedure 9(b).¹ The
2 Court granted Plaintiff leave to file a first amended complaint (the
3 FAC"), which Plaintiff timely accomplished on March 10, 2006.

4 Defendant has filed a motion to dismiss the FAC's causes of
5 action for fraud, negligent misrepresentation, and breach of the
6 covenant of good faith and fair dealing. Defendant has also filed a
7 motion to strike portions of the FAC. Defendant does not seek to
8 dismiss the FAC's federal and California statutory wage and hour
9 claims.

10 For reasons stated below, the Court GRANTS Defendant's motion to
11 dismiss. The Court also GRANTS Defendant's motion to strike.

12 13 II. BACKGROUND

14 Defendant Micro Electronics is a multi-state electronics retailer
15 with its domicile in Delaware and its principal administrative offices
16 in Hillard, Ohio. Plaintiff Gilles is currently a sales associate
17 employed at a Micro Electronics store in Tustin, California. It is
18 not clear when his employment began. Plaintiff's compensation
19 consists of a base salary, which is \$4 per hour, plus 2% sales
20 commissions.

21 The FAC makes five essential allegations. First, Defendant has
22 willfully maintained a policy of non-payment or improper payment of
23 overtime compensation, which the law requires to be paid at one and
24 one-half or two times the regular rate of pay, depending on the hours
25

26 The Court also dismissed with prejudice a claim made under
27 California Labor Code § 203. Section 203 relates to wage
28 payments after an employee's discharge or termination. Because
Plaintiff alleged that he was still employed by Defendant, he
could not state a claim for post-termination wage payments.

1 worked. Second, Defendant failed to pay Plaintiff the lawful minimum
2 wage, because Plaintiff was sometimes required to perform inventory
3 work, during which time he was paid only \$4.00 per hour without the
4 opportunity to earn sales commissions. Third, Defendant has failed to
5 provide Plaintiff with itemized statements at the time of wage payment
6 as required by California Labor Code § 226(a). Fourth, Defendant has
7 fraudulently represented to Plaintiff that he could be required to
8 work hours outside of his regular shift without overtime compensation.
9 One such misrepresentation - or more accurately, a material omission -
10 was made on March 27, 2005, when Plaintiff received a document
11 entitled the "Micro Electronics, Inc. Employment Agreement" ("the
12 Agreement" or "the Employment Agreement"). (FAC Ex. A.) The
13 document described Plaintiff's position as "sales associate," but
14 failed to disclose that he would be asked to restock shelves and
15 organize inventory before, during, and after regular business hours.
16 The document was allegedly designed to induce Plaintiff "to work
17 outside of shift hours and not request appropriate premium
18 compensation for overtime hours worked." (FAC ¶ 58.) Fifth,
19 Defendant retaliated against Plaintiff after he commenced the present
20 litigation, by requiring him to spend more time restocking shelves and
21 organizing inventory, thereby reducing the amount of time he had to do
22 sales work and earn commissions.

23 On the basis of these allegations, the FAC asserts the following
24 causes of action: (1) violation of section 7 of the Fair Labor
25 Standards Act ("FLSA"), 29 U.S.C. § 207, for failure to pay overtime
26 compensation; (2) violation of section 7(a) of the FLSA, 29 U.S.C. §
27 207(a); (3) breach of the covenant of good faith and fair dealing; (4)
28 fraud; (5) negligent misrepresentation; (6) violation of California

1 Labor Code, §§ 1194, 1198 and § 510, for failure to pay overtime
2 compensation in accordance with the California Industrial Welfare
3 Commission ("IWC") wage order applicable to Plaintiff; (7) violation
4 of 29 U.S.C. § 215(a), for retaliating against Plaintiff for
5 commencing the instant action; (8) violation of 29 U.S.C. § 216(b) and
6 Cal. Labor Code § 1194, for failure to pay the minimum wage; (9)
7 violation of California Labor Code § 226, for failure to provide
8 itemized statements at the time of payment of wages; (10) violation of
9 California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et
10 seq.; (11) declaration that Plaintiff's \$4 per hour base wage is
11 illegal and that certain terms in the Agreement are also illegal.
12 With the exception of the retaliation claim, the complaint is
13 purportedly brought on behalf of a nationwide class of plaintiffs
14 similarly situated as Plaintiff. Plaintiff demands damages,
15 liquidated damages, punitive damages, statutory penalties,
16 restitution, and attorney's fees.

17 The initial complaint was filed in this Court on October 19,
18 2005. On November 29, 2005, Defendant filed a partial motion to
19 dismiss. On February 17, 2006, the Court dismissed Plaintiff's fraud
20 and negligent misrepresentation claims without prejudice, and his Cal.
21 Labor Code § 203 claim with prejudice. On March 10, 2006, Plaintiff
22 filed the FAC. On March 27, 2006, Defendant again filed a partial
23 motion to dismiss, this time against the claims of fraud, negligent
24 misrepresentation, and breach of the covenant of good faith and fair
25 dealing. Defendant also concurrently filed a motion to strike.
26 Plaintiff filed his opposition brief on April 10, 2006. Defendant
27 replied on April 17, 2006. A hearing was held on April 24, 2006.
28

1 III. MOTION TO DISMISS

2 A. Legal Standard

3 In considering a 12(b)(6) motion to dismiss, the Court must
4 accept as true all factual allegations of the non-moving party, and
5 should grant dismissal only if the non-moving party can prove no set
6 of facts to support his claim. Western Reserve Oil & Gas Co. v. New,
7 765 F.2d 1428 (9th Cir. 1985). The standard for a 12(b)(3) motion is
8 identical. The trial court "must draw all reasonable inferences in
9 favor of the non-moving party and resolve all factual conflicts in
10 favor of the non-moving party." Murphy v. Shneider Nat'l Inc., 362
11 F.3d 1133, 1138-40 (9th Cir. 2004).

12 Additionally, this case implicates the heightened pleading
13 standard of Rule 9(b). "It is well established in the Ninth Circuit
14 that both claims for fraud and negligent misrepresentation must meet
15 Rule 9(b)'s particularity requirements." Neilson v. Union Bank of
16 California, N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003). "A
17 motion to dismiss a complaint or claim 'grounded in fraud' under Rule
18 9(b) for failure to plead with particularity is the functional
19 equivalent of a motion to dismiss under Rule 12(b)(6) for failure to
20 stat a claim." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th
21 Cir. 2003). "Because a dismissal of a complaint or claim grounded in
22 fraud for failure to comply with Rule 9(b) has the same consequences
23 as a dismissal under Rule 12(b)(6), dismissals under the two rules are
24 treated in the same manner." Id.

25 /

26 /

27 /

28

1 B. Whether Plaintiff May Assert Common Law Claims For
 2 Violations Of Statutory Rights

3 Defendant contends that Plaintiff may not recover at common law
 4 for alleged violations of his statutory rights to overtime pay and the
 5 minimum wage. As Defendant correctly points out, the FAC's fraud and
 6 negligent misrepresentation counts are essentially statutory overtime
 7 claims repackaged in common law garb. The alleged misrepresentation
 8 is that Defendant knew that Plaintiff was legally entitled to
 9 statutory overtime pay, but failed to disclose that entitlement to
 10 Plaintiff.² The FAC states, "[a]s a direct result of the [fraudulent]
 11 assertions and concealment by Defendants, and Plaintiffs have earned,
 12 but have not been paid, overtime wages plus interest thereon,
 13 according to proof." (FAC ¶ 61.) Similarly, the FAC's claim for
 14 breach of the covenant of good faith and fair dealing is derivative of
 15 its statutory causes of action. The breach of covenant count states
 16 that "Defendant's denial of overtime wages and minimum wages was

17 _____
 18 2
 19 The relevant part of the FAC states:

20 Plaintiffs allege that Defendant have known
 21 Plaintiffs' Class . . . could not be ordered and/or
 22 permitted to work beyond the normal ending time of a
 23 shift without receiving premium pay for the time of the
 24 shift extension.

25 Specifically, as to sales persons at Micro Center:

26 a. Defendants regularly observed, encouraged,
 27 and/or required Plaintiffs' Class to perform non-exempt
 28 work; and

29 b. Defendants knew that the Plaintiffs' Class
 30 regularly spent much of their work time performing non-
 31 exempt duties.

32 Despite having this knowledge, Defendants
 33 suppressed the facts and did not disclose them to
 34 Plaintiffs' Class, while having a legal duty under the
 35 Labor Code and the applicable IWC Wage Orders to
 36 disclose same to Plaintiffs' Class.

37 (FAC ¶¶ 52-54.)

1 wrongful, in bad faith, and unfair, and therefore was a violation of
2 Plaintiff's legal duties. Plaintiff allege that Defendants breached
3 the covenant of good faith and fair dealing as alleged herein"
4 (FAC ¶ 41-42.) There is no doubt that a worker's entitlement to
5 overtime pay and the minimum wage is a right created by federal and
6 state statutes rather by operation of the common law. The issue is,
7 in addition to his statutory remedies, whether Plaintiff may recover
8 at common law for violations of statutory rights created by the FLSA
9 and the California Labor Code. The question is essentially one of
10 legislative intent - whether the legislature intended for common law
11 actions to vindicate the statutory rights it created.

12
13 1. California Labor Code

14 Under California's exclusive remedy doctrine, "where a statute
15 creates a right that did not exist at common law and provides a
16 comprehensive and detailed remedial scheme for its enforcement, the
17 statutory remedy is exclusive." Rojo v. Kliger, 52 Cal. 3d 65, 79
18 (1990). On the other hand, "where a statutory remedy is provided for
19 a pre-existing common law right, the newer remedy is generally
20 considered to be cumulative, and the older remedy may be pursued at
21 Plaintiff's election." Id. In this case, because overtime pay and
22 the minimum wage are rights created by the California Legislature and
23 did not exist at common law, the statutory remedy is exclusive of
24 common law remedies. Plaintiff argues that the exclusive remedy
25 doctrine does not apply because remedies for fraud, negligent
26 misrepresentation, and breach of covenant existed at common law. The
27 argument is without merit. The loss Plaintiff allegedly suffered as a
28 result of Defendant's deception was the statutory overtime pay he

1 would have collected had him been told about his rights. Likewise,
2 the damage allegedly caused by Defendant's breach of the covenant of
3 good faith and fair dealing was the statutory wages Plaintiff would
4 have been paid if not for Defendant's bad faith conduct. Plaintiff
5 does not, and cannot, argue that some type of common law action for
6 overtime pay and the minimum wage predated the enactment of the wage
7 and hour provisions of the California Labor Code. Dismissal is
8 warranted under the exclusive remedy doctrine.

9
10 2. *Plaintiff's Federal Statutory Rights*

11 Plaintiff's common law claims also duplicate statutory remedies
12 provided by the FLSA. Plaintiff relies on Williamson v. General
13 Dynamics Corp., 208 F.3d 1144 (9th Cir. 2000), to argue that federal
14 overtime and minimum wage entitlements can be recovered at common law.
15 In Williamson, the plaintiffs were employees who planned to join a
16 class action settlement that arose from litigation over General
17 Dynamics' alleged failure to pay overtime wages. They ultimately
18 decided not to participate in the settlement due to management
19 representations that their participation in the lawsuit would amount
20 to "career suicide," and that they still had "viable careers" with the
21 company if they chose not to participate. However, at the time these
22 representations were made, management had already decided to shut down
23 the business unit where the plaintiffs were employed. After the
24 shutdown, plaintiffs sued on a theory of "career fraud," alleging that
25 they would have participated in the settlement if not for the
26 defendant's false representations that they had viable careers. Id.
27 at 1147-49. The precise question before the Ninth Circuit was whether
28 the plaintiff's common law career fraud claim was preempted for

1 conflict with the FLSA. The court held that conflict preemption did
2 not apply, because the "[the defendant's] allegedly fraudulent conduct
3 was not covered by a FLSA provision." Id. at 1153. Since the
4 plaintiffs could not recover for career fraud under the FLSA, the
5 common law claim was independent from and did not conflict with the
6 FLSA. However, the Ninth Circuit also unequivocally stated: "Claims
7 that are directly covered by the FLSA (such as overtime and
8 retaliation disputed) *must* be brought under the FLSA." Id. at 1154
9 (emphasis added).

10 Plaintiff's common law claims are easily distinguished from the
11 career fraud claim in Williamson. Even though the settlement in
12 Williamson arose from alleged violations of the FLSA, under their
13 theory of career fraud, the plaintiffs did not have to prove a FLSA
14 violation. All the plaintiffs had to prove was that they were
15 eligible to participate in the settlement, and that they were
16 fraudulently induced not to do so. In contrast, for Gilles to prevail
17 on his common law claims, he will have to prove that Defendant
18 actually violated the FLSA. After all, unless he was actually
19 entitled to overtime pay, he cannot recover for any false
20 representation regarding his entitlement to overtime pay. In effect,
21 his common law claims seek to recover directly for FLSA violations.
22 Under the Ninth Circuit's teaching that claims directly covered by the
23 FLSA must be brought under the FLSA, id. at 1154, Plaintiff's common
24 law claims should be dismissed.

25 This district has reached the same result with regard to common
26 law negligence claims brought for violations of wage and hour
27 statutes. In Flores v. Albertson's, Inc., 2003 WL 24216269 (C.D. Cal.
28 2003), the plaintiffs - janitors employed by a subcontractor to clean

1 stores owned by Albertson's supermarket chain - alleged that the
2 defendants negligently permitted violations of FLSA's wage and hour
3 provisions. The court ruled that "to allow Plaintiffs' negligence
4 claims to proceed, which are nothing more than additional legal
5 theories to recover damages stemming from the alleged wage and hour
6 claims, would upset the balance established by Congress in enacting
7 the statute." Id. at *5. Likewise, in Petras v. Johnson, 1993 WL
8 228014 (S.D.N.Y.), the court dismissed a common law fraud claim
9 alleging that the defendant falsely represented plaintiff's
10 entitlement to overtime pay.

11 Accordingly, the Court will dismiss Plaintiff's claims of fraud,
12 negligent misrepresentation, and breach of the covenant of good faith
13 and fair dealing. Because the Court finds that statutory remedies are
14 exclusive of these common theories, dismissal shall be with prejudice.

15
16 *3. Employment Fraud*

17 Plaintiff argues that, even if the common law wage and hour
18 claims are barred, Plaintiff still has a claim for employment fraud
19 that is not derivative of statutory rights. Plaintiff contends that
20 the FAC makes an allegation that Defendant misrepresented the nature
21 of Plaintiff's job responsibilities, independently of any
22 misrepresentations regarding overtime pay.

23 However, the FAC does not fact seek recovery for
24 misrepresentation of job responsibilities. The relevant parts of the
25 FAC states:

26 Defendants, through hiring interviews, meetings, inter-
27 office memos . . . have continuously represented to
28 Plaintiffs' class that they can be required to work hours

1 outside of their regular shift, with no proper overtime
2 compensation.

3 *One of such representations* was made on or about March
4 27, 2005. On or about March 27, 2005, Defendants, through
5 their agent, represented to Plaintiff Giles in writing, a
6 copy of which is attached hereto as Exhibit A, that he would
7 be employed as a Sales Associate. No where in the writing
8 did Defendants inform Plaintiff Gilles that he would be
9 required to do the non-sales, manual labor work a
10 significant portion of the time during the business hours.
11 Defendants require (and require at all relevant times)
12 Plaintiff Giles and others similarly situated to perform
13 said manual labor in suit and tie, before the store opens,
14 during the business hours, and after the store closes.
15 Plaintiff Gilles and other similarly situated were in effect
16 defrauded into working two distinct jobs; a Sales Associate
17 and a Stocking Clerk.

18 (FAC ¶¶ 55-56) (emphasis added). Read in context, it is clear that
19 the FAC introduced the Employment Agreement merely as an example of a
20 misrepresentation of overtime pay. Moreover, the FAC has not alleged
21 damages that flowed from the misrepresentation of Plaintiff's
22 responsibilities, separately from the denial of overtime pay. In any
23 event, as discussed below, even if the Court assumes that the FAC did
24 seek recovery for employment fraud, dismissal is warranted because the
25 FAC has not pleaded fraud with particularity as required by Rule 9(b).

26 /

27 /

28 /

1 C. Rule 9(b)

2 "In all averments of fraud or mistake, the circumstances
3 constituting fraud or mistake shall be stated with particularity.
4 Malice, intent, knowledge, and other conditions of mind of a person
5 maybe averred generally." Fed. R. Civ. P. 9(b) (emphasis added). The
6 complaint must be "specific enough to give defendants notice of the
7 particular misconduct . . . so that they can defend against the charge
8 and not just deny that they have done anything wrong." Vess, 317 F.3d
9 at 1106 (citation omitted). It should describe "the who, what, when,
10 where, and how" of the alleged misconduct. Id. (citation omitted).
11 As the Ninth Circuit has explained,

12 a plaintiff must set forth more than the neutral facts
13 necessary to identify the transaction. The plaintiff must
14 set forth what is false or misleading about a statement, and
15 why it is false. In other words, the plaintiff must set
16 forth an explanation as to why the statement or omission
17 complained of was false or misleading.

18 In re GlenFed, Inc. Securities Litigation, 42 F.3d 1541, 1548 (9th
19 Cir. 1994) (en banc) (superceded on other grounds by the Private
20 Securities Litigation Reform Act, 18 U.S.C. § 78u-4 (1995)).³

21 In this case, the FAC has failed to adequately allege the "how"
22 of fraud. The only specific instance of fraud the FAC has identified
23

24
25 ³ GlenFed has been superceded by the Private Securities
26 Litigation Reform Act ("PLSRA"), 18 U.S.C. § 78u-4, to the
27 extent it held that a federal securities fraud claim need only
28 make a conclusory allegation of scienter to survive a motion to
dismiss. See Marksman Partners, L.P. v. Chantal Pharmaceutical Corp., 927 F. Supp. 1297, 1309 (C.D. Cal. 1996). This case does not implicate federal securities laws, so GlenFed is still good law for purposes of this Motion.

1 is the Employment Agreement dated March 27, 2005, and attached to the
2 pleading. The Agreement identified Plaintiff's position as "Sales
3 Associate," set his compensation at \$4.00 per hour plus 2.00%
4 commissions and benefits, established the employment relationship as
5 at-will, and contains miscellaneous provisions regarding non-
6 competition, employee's duty of care, waiver, severability, choice of
7 law, and amendment procedures.

8 Plaintiff's primary theory of fraud is that the Agreement made a
9 misleading omission by not informing Plaintiff of his entitlement to
10 overtime compensation. However, the Agreement is silent as to
11 Plaintiff's entitlement to overtime pay or exempt status. The
12 contents of the Agreement does not give rise to any inference, one way
13 or another, as to whether Plaintiff was entitled to overtime pay.
14 There is simply nothing in the Employment Agreement that was made
15 misleading by the alleged omission.

16 Alternatively, Plaintiff also argues that the Agreement
17 misrepresented his job responsibilities. The Employment Agreement did
18 not contain a job description, but simply used the term "Sales
19 Associate" to identify Plaintiff's position. In effect, Plaintiff
20 contends that the term "Sales Associate" was inherently misleading,
21 because he was required to spend part of his work hours organizing
22 inventory rather than selling electronics. But it is hardly
23 surprising that an employee who works in a retail establishment would
24 be required to restock shelves as part of his job. Under a common
25 sense understanding of sales positions in the retail business, there
26 is no reason to think that fraud was committed merely by using the
27 term "sales associate" to refer to a position that included some
28 responsibility for restocking shelves. The job title might be

1 considered misleading had Plaintiff alleged that he spent the majority
2 of his time on inventory rather than on sales, but Plaintiff has not
3 so alleged.

4 Plaintiff's pleading of fraud has already been dismissed once for
5 failure to comply with Rule 9(b). All Plaintiff has added in the FAC
6 is the Employment Agreement, which does not come close to supporting
7 an inference of fraud. Due to Plaintiff's woefully inadequate showing
8 with the FAC, the Court will not grant Plaintiff further leave to cure
9 his pleading deficiencies.

10
11 D. Negligent Misrepresentation

12 Lastly, Defendant correctly points out that an omission cannot
13 give rise to a negligent misrepresentation claim. Byrum v. Brand, 219
14 Cal. App. 3d 926, 940 (1990). This constitutes yet another ground for
15 dismissing the negligent misrepresentation claim.

16
17 **IV. MOTION TO STRIKE**

18 Defendant has moved to strike, under Federal Rule of Civil
19 Procedure 12(f), four alleged deficiencies in the FAC: (1) references
20 to a nationwide class of plaintiffs for Plaintiff's California Labor
21 Code claims; (2) use of the term "class action" in connection with the
22 FLSA claims, even though only collective actions are permitted for
23 FLSA claims, 29 U.S.C. § 216(b); (3) requests for punitive damages for
24 the breach of the covenant of good faith and fair dealing; and (4)
25 request for punitive damages with respect to the declaratory judgment
26 cause of action. In the opposition brief, Plaintiff conceded all of
27 Defendant's arguments and stipulated to exclude the challenged
28


1 language from the FAC.⁴ Accordingly, the Court ORDERS stricken from
 2 the FAC all language that Plaintiff has stipulated to exclude.

3
 4 V. CONCLUSION

5 For the foregoing reasons, the Court DISMISSES WITH PREJUDICE the
 6 FAC's third (breach of covenant of good faith and fair dealing),
 7 fourth (fraud), and fifth (negligent misrepresentation) causes of
 8 action. The Court further ORDERS stricken from the FAC all language
 9 that Plaintiff had stipulated to exclude.

10
 11
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 16
 17
 18 IT IS SO ORDERED.

19
 20 DATED: 4/25/06


 21 STEPHEN V. WILSON
 22 UNITED STATES DISTRICT JUDGE
 23
 24
 25

26 ⁴ Plaintiff does make a procedural argument against the motion
 27 to strike: that the motion is barred because Rule 12(f) requires
 28 the motion to be filed prior to a responsive pleading. However,
 Defendant has yet to file an answer to the FAC. Thus, the motion
 has been timely filed.